

Hon. Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

LETICIA LUCERO,

Plaintiff,

vs.

CENLAR FSB and BAYVIEW LOAN
SERVICING, LLC, et al.,

Defendants.

NO. 2:13-cv-00602 RSL

MOTION TO ACCEPT THIRD
AMENDED COMPLAINT AS FILED
OR IN THE ALTERNATIVE, MOTION
FOR LEAVE TO AMEND SECOND
AMENDED COMPLAINT IN ITS
ENTIRETY

NOTE ON MOTION CALENDAR:

FRIDAY, NOVEMBER 14, 2014

Plaintiff LETICIA LUCERO, by and through the undersigned counsel, respectfully moves the Court for an Order Accepting the Attached Third Amended Complaint, or in the alternative, for leave to amend her Second Amended Complaint in its entirety pursuant to *FRCP 15(a)*.

I. PROCEDURAL FACTS

1. Plaintiff moved to amend her Complaint on May 13, 2014 (Dkt. #60), The Court granted Plaintiff leave to amend via order (Dkt. 77). Plaintiff filed her Second Amended MOTION FOR LEAVE TO AMEND - 1

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1 Complaint on the same day (Dkt. # 78).

2 2. Defendants Cenlar, MERS, Dobron and Morris filed Motion to Dismiss on July
3 10, 2014 (Cenlar's Motion to Dismiss) (Dkt. #82).

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5 3. On October 3, 2014, this Court issued Amended Order Granting in part and
6 Denying in part Cenlar's Motion to Dismiss. The Court's Order authorized Plaintiff to amend
7 her claims under RESPA and TILA (Dkt. #107).

8 4. Defendant Bayview filed its Motion to Dismiss on July 31, 2014 (Dkt. #90).

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10 5. On October 3, 2014, this Court issued Order Granting in part, and Denying in
11 part Bayview's Motion to Dismiss. The Court's Order authorized Plaintiff to amend her
12 FDCPA claims (Dkt. #119).

13 6. Plaintiff seeks to amend the Second Amended Complaint, in addition to those
14 claims permitted by the Court, to add or modify claims to reflect changes in the law based on
15 Washington Supreme Court's issuance of *Frias v. Asset Foreclosure Services, Inc.*, 2014
16 Wash. LEXIS 763 (2014).

17 **II. LEGAL AUTHORITIES & ARGUMENT**

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19 This Court has held previously in *McDonald v. OneWest Bank*, FSB, 2012 U.S. Dist.
20 LEXIS 21449 (W.D. Wash. 2012) that "Courts 'should freely give leave [to amend] when
21 justice so requires.' Fed. R. Civ. P. 15(a)(2). There is a 'strong policy in favor of allowing
22 amendment' after 'considering four factors: bad faith, undue delay, prejudice to the opposing
23 party, and the futility of amendment.' *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994). The
24 underlying purpose of Rule 15 is 'to facilitate decision on the merits, rather than on the
25 pleadings or technicalities.' *Lopez v. Smith*, 203 F.3d 1122, 1127." *McDonald, supra*. HN3Go
26 to the description of this Headnote. Rule 15(a) expresses a strong presumption in favor of
27 liberal pleading:
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1 Rule 15(a) declares that leave to amend "shall be freely given when justice so
 2 requires"; this mandate is to be heeded. If the underlying facts or circumstances
 3 relied upon by a plaintiff may be a proper subject of relief, he ought to be
 4 afforded an opportunity to test his claim on the merits. In the absence of any
 5 apparent or declared reason--such as undue delay, bad faith or dilatory motive
 6 on the part of the movant, repeated failure to cure deficiencies by amendments
 7 previously allowed, undue prejudice to the opposing party by virtue of
 8 allowance of the amendment, futility of amendment, etc.--the leave sought
 9 should, as the rules require, be "freely given."

10 *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962).

11 On September 18, 2014, the Washington Supreme Court issued *Frias v. Asset*
 12 *Foreclosure Services, Inc.*, 2014 Wash. LEXIS 763 (2014), holding that the DTA does not
 13 create an independent cause of action for monetary damages based alleged violations of its
 14 provisions if no foreclosure sale has been completed. The decision impacts all of Plaintiff's
 15 DTA claims against the Defendants. Based on *Frias*, the proposed amendment, then, simply
 16 offers a new legal theory, and amendments that merely propose alternative legal theories for
 17 recovery on the same underlying facts should generally be permitted. See *Mayeaux v.*
 18 *Louisiana Health Service & Indemnity Co.*, 376 F.3d 420, 427 (5th Cir. 2004); *Lowrey v. Texas*
 19 *A & M University System*, 117 F.3d 242, 246 n.2 (5th Cir. 1997); *In re Integrated Resources,*
 20 *Inc.*, 157 B.R. 66, 71 (S.D.N.Y. 1993).

21 This Court has already granted Plaintiff leave to amend. The only additional relief
 22 requested is Plaintiff's ability to plead an alternative theory of liability in place of liability
 23 arising out of the DTA. Justice will be served by the Court's grant of leave to amend.

24 **III. CONCLUSION**

25 For all of the foregoing factual reasons and legal citations, Plaintiff prays the Court to
 26 accept her Third Amended Complaint as attached or, in the alternative, allow her to amend her
 27 claims as set forth in the attached Third Amended Complaint to this Motion.
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1 DATED this 21st day of October, 2014.
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5 /s/ Vicente Omar Barraza

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